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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

HAND-DELIVERED

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554


Re: MM Docket No. 92-81, RM-7875, *Amendment of Section 73.606(b)*
Table of Allotments Television Broadcast Stations (Farmington and
Gallup, New Mexico) -- Opposition to Petition for Reconsideration

Dear Mr. Secretary:

On behalf of Pulitzer Broadcasting Company ("Pulitzer"), permittee of Station KOFT-TV, Gallup, New Mexico, and pursuant to Sections 1.420 and 1.429 of the Commission's Rules, I enclose herewith for filing an original and four (4) copies of Pulitzer's Opposition to Petition for Reconsideration in the proceeding noted above.

Please stamp and return to this office the enclosed copy of this filing designated for that purpose. You may direct any questions concerning this material to the undersigned.

Respectfully submitted,



Eric T. Werner

Enclosures

cc: Mr. Ken Elkins
Ms. Mary Lynn Roper
Mr. Charles Amy
Erwin G. Krasnow, Esquire

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BEFORE THE
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WASHINGTON, D.C. 20554

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In the Matter of)

Amendment of Section 73.606(b))

Table of Allotments)

Television Broadcast Stations)

(Farmington and Gallup, New Mexico))

MM Docket No. 92-81

RM-7875

APR 11 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

TO: Chief, Allocations Branch
Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

PULITZER BROADCASTING COMPANY

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April 11, 1996

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**BEFORE THE
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TO: Chief, Allocations Branch
Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

PULITZER BROADCASTING COMPANY (hereinafter "Pulitzer"), permittee of Station KOFT-TV, Gallup, New Mexico,^{1/} by its attorneys and pursuant to Section 1.106(g) of the Commission's Rules, 47 C.F.R. § 1.106(g) (1994), hereby submits its Opposition to the Petition for Reconsideration ("Petition") filed on March 29, 1996 by KOB-TV, Inc. ("KOB") in the above-captioned proceeding.^{2/}

I. INTRODUCTION

KOB's Petition challenges the decision of the Mass Media Bureau ("Bureau") to reallocate Channel 3 from Gallup to Farmington, New Mexico, and to modify the construction permit for the Station to specify Farmington as its community of license. *See Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations. (Farmington and Gallup, New Mexico, DA 96-128 (released February 23, 1996) (Report and Order in MM*

^{1/} Station KOFT-TV previously was assigned the call sign KOAV-TV, which is the designation used in the *Report and Order*. To avoid confusion, the station will be referred to herein simply as the "Station."

^{2/} Citations will appear as "Petition at ____."

Docket No. 92-81, RM-7875) [hereinafter "*Report and Order*"]. KOB, in addition to being the licensee of Station KOB-TV, Albuquerque, New Mexico, is also the licensee of Station KOB(TV), Farmington, New Mexico; and the instant Petition represents the latest, attempt by the dominant licensee in Farmington to safeguard its monopoly at the expense of the public interest.

After more than four years of proceedings and careful consideration of the arguments advanced both by Pulitzer and KOB, the Bureau determined that

the public interest would be served by reallocating Channel 3 from Gallup to Farmington since it could provide the larger community with its second local and first competitive television service and provide a first Grade B service to 3,366 persons within a 3,162 square kilometer area and a second such service to 67,444 persons within a 10,176 square kilometer area.

Report and Order at 4 ¶ 18 (emphasis added). In reaching this conclusion, the Bureau expressly rejected KOB's assertion that the reallocation would create a "white area" in Gallup, observing that the proposed change involved an unbuilt station and, accordingly, no white area would, in fact, be created. *Id.* ¶ 19.^{3/} Thus, unable to ring the bell on its first attempt, KOB now picks up its hammer once again to take another swing.

In its Petition, KOB attempts to overcome the critical shortcoming in its "white area"

^{3/} The Bureau acknowledged the Commission's special concern about the removal of an existing service from a community; however, it correctly recognized that the Commission has defined "existing service" as "a station which has been constructed." *Id.* The Bureau reasoned:

In this case, Station KOAV-TV is unbuilt and thus not operational. Therefore there is no present service which the residents of Gallup and the surrounding area have come to rely on. Further, while the failure to activate Channel 3 at Gallup will perpetuate the existing 'white area,' it will not create one.

Id. (emphasis added).

argument by trying to change the dispositive fact. Specifically, KOB challenges as erroneous the Bureau's conclusion that the Station did not constitute an "existing service" in Gallup. In essence, KOB claims, the Bureau should have imputed "existing service" status to the Station notwithstanding its demonstrable non-existence. In support of this novel proposition, KOB advances two arguments: First, it claims that Pulitzer's deferment of construction of the Station violated Section 73.3534(b) of the Commission's rules, Petition at 6-9; second, it alleges that Pulitzer's request to reallocate Channel 3 to Farmington was filed in bad faith and abused the Commission's processes. Petition at 9-13. On both counts, KOB once again misses its mark.

II. DISCUSSION

A. KOB's Section 73.3534(b) Argument Must Be Rejected as an Untimely Collateral Attack on the Bureau's Extensions of Pulitzer's Construction Permit for the Station and, In Any Event, Pulitzer Did Not Violate Section 73.3534(d)

In its first assault on the outcome reached in the *Report and Order*, KOB cites Pulitzer's several requests for extension of its construction permit for the Station, and its related forbearance from construction of the Station, to assert that Pulitzer has repeatedly violated Section 73.3534(b) of the Commission's rules, 47 C.F.R. § 73.3534(b) (1994). Petition at 6. KOB devotes considerable attention to reciting a chronology of Pulitzer's requests, *see generally id.* at 3-6; however, KOB overlooks an important fact relative to each of them: The Bureau had the opportunity to review the merits of each of Pulitzer's requests, and in every instance it granted the extension.

Furthermore, each of Pulitzer's requests appeared on Public Notice both at the time the application for extension of time was filed, and again after the Commission took final

action on it. KOB had the opportunity to challenge each of the extensions on numerous occasions if it desired, but it neglected to do so.^{4/} KOB may not now impugn Pulitzer's forbearance from construction of the Station which followed from extensions lawfully granted by the Commission. KOB's present objection that Pulitzer violated the rule amounts to an untimely collateral attack on the Bureau's findings in each of these instances and, as such, it must be rejected. Moreover, even assuming, *arguendo*, that the instant Petition properly raised the matter, KOB's claim must be rejected on its merits because each of Pulitzer's extension requests properly complied with Section 73.3534(b) and the Commission's grant thereof in each instance fully comported with FCC precedent.

In relevant part, Section 73.3534(b) provides that "[a]pplications for extension of time to construct broadcast stations . . . will be granted only if one of the following three circumstances have occurred" 47 C.F.R. § 73.3534(b) (1994). Among these circumstances, the rule will permit an extension where "(3) No progress has been made for reasons clearly beyond the control of the permittee . . . but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction." *Id.* As KOB repeatedly emphasizes, each of the extension requests informed the Commission that Pulitzer's failure to construct was attributable to reasons beyond its control, namely that the underlying reallocation rulemaking proceeding had not yet been resolved and that no transmitter site existed which was capable of providing city-grade service to both Farmington

^{4/} Indeed, the most recent extension request noted by KOB, Petition at 5 -- filed on September 1, 1995 -- was granted on February 8, 1996. See Public Notice, *Broadcast Actions*, Report No. 43673, released February 13, 1996 (Noting the grant of application File No. BPCT-950901KF). The Bureau's action appeared on public notice on February 13, 1996. *Id.* Accordingly, the deadline for seeking reconsideration of that extension was March 14, 1996. KOB did not file the instant Petition until March 29, 1996, more than two weeks after the deadline.

and Gallup.^{5/} Moreover, Pulitzer informed the Commission that it had "taken all possible steps to prosecute the Petition for Rule Making before the Commission."^{6/} These considerations fully satisfied Section 73.3534(b)(3) and justified Pulitzer in forbearing from undertaking construction while the rulemaking proceeding was underway.

Indeed, the Commission recently expressly rejected KOB's claim that a permittee is obligated to construct its station notwithstanding the pendency of a rulemaking proceeding that relates to the status of the station in question. *Contemporary Media, Inc.*, FCC 95-410, released October 10, 1995, at 10 (FM permittee not required to construct during pendency of rulemaking proceeding to upgrade the station from Class C2 to Class C1 status). The Commission found that "[s]uch a requirement would wasteful and unreasonable . . . " adding that it "view[s] the time elapsed while awaiting Commission action on such a rule making proceeding as being circumstances beyond the control of the applicant, within the meaning of Section 73.3534(b)(3) of the Rules." *Id.* (emphasis added).

The cases cited by KOB in the Petition, at pp. 7-8, do not dispel this conclusion.^{7/}

None of them involves circumstances such as those present here, where the applicant's

^{5/} Thus, Pulitzer observed, if it were to commence construction at Gallup and the FCC reallocated Channel 3 to Farmington (as it ultimately did), Pulitzer would be left with stranded investment at the Gallup site. *See e.g.*, Application for Extension of Broadcast Construction Permit (FCC Form 307) filed January 29, 1992 by Pulitzer Broadcasting Company at Exhibit 1, appended to Petition as Exhibit A.

^{6/} *Id.* In this respect, KOB's present objection to Pulitzer's forbearance from construction, while not surprising, is somewhat hypocritical in view of the fact that most of the delay in resolving the reallocation proceeding can be ascribed to KOB's persistent opposition to Pulitzer's request.

^{7/} *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026 (1991); *New Dawn Broadcasting*, 2 FCC Rcd 4383 (Mass Media Bur. 1987); *Cidra Broadcasters, Inc.*, 2 FCC Rcd 230 (Mass Media Bur. 1987); *East Texas Television Network, Inc.*, 2 FCC Rcd 2931 (Mass Media Bur. 1987), 2 FCC Rcd 2933 (Mass Media Bur. 1987).

failure to construct stemmed from the pendency of a rulemaking proceeding directly relevant to the status of the permitted station itself. Instead, they present circumstances where the applicant failed to construct either because (1) pending FCC proceedings not involving the subject station were expected collaterally to affect the station's market in some way,^{8/} or (2) economic conditions in the subject station's local market allegedly impeded the permittee's ability to construct.^{9/} Neither of those circumstances is present here: Pulitzer delayed construction of the Station not because of any collateral FCC proceeding, but because of the pendency of a proceeding that concerned issues directly bearing on basic specifications of the Station's permit (*i.e.*, its community of license). While concern about the ability of the Gallup community economically to sustain operation of a television station contributed to Pulitzer's decision to seek the rulemaking, Pulitzer's failure to construct the Station is attributable wholly to the pendency of that proceeding, not to any other motive.^{10/} Accordingly, KOB's attack on Pulitzer's failure to construct the Station must be rejected.

^{8/} See, *e.g.*, *Community Service Telecasters, Inc.*, 6 FCC Rcd 6026 (1991); *New Dawn Broadcasting*, 2 FCC Rcd 4383 (Mass Media Bur. 1987).

^{9/} See, *e.g.*, *Cidra Broadcasters, Inc.*, 2 FCC Rcd 230 (Mass Media Bur. 1987); *East Texas Television Network, Inc.*, 2 FCC Rcd 2931 (Mass Media Bur. 1987), 2 FCC Rcd 2933 (Mass Media Bur. 1987).

^{10/} KOB would have the Commission believe that the economic viability of Gallup constituted the sole motivation for Pulitzer's rulemaking request. Petition at 6. The Commission should not be so misled. As the *Report and Order* reflects, Pulitzer's primary motivation and justification for its request was "that reallocation of Channel 3 to Farmington would result in a preferential arrangement of allotments since it would enable [the Station] to provide service to 142,098 persons within an area of 2,610 square kilometers (1,008 square miles) including a first Grade B television reception service to 90,462 persons." *Report and Order* at 1 ¶ 2. Gallup's economic circumstances constituted only one consideration to be factored into the balance of interests in evaluating this rationale. See generally Comments of Pulitzer Broadcasting Company in MM Docket No. 92-81, filed June 8, 1992 [hereinafter "Pulitzer Comments"].

B. Pulitzer's Request for Reallotment of Channel 3 Comported Fully with the Letter and Spirit of the Commission's Rules and Policies Governing Changes of Community of License

Lacking any legally or factually meritorious grounds for contesting the reallotment, KOB resorts to an *ad hominem* attack, charging that Pulitzer has engaged in bad faith and has abused the Commission's processes. Petition at 9. This unvarnished exercise in name-calling insults both Pulitzer and the Commission and should not occupy the Commission's time and must be rejected out of hand first, because it is demonstrably false and second, because KOB has improperly raised it for the first time in this reconsideration proceeding.

As an initial matter, KOB's charge must be rejected as false. Quite contrary to KOB's claim, *id.*, the record in this proceeding establishes that Pulitzer possessed a *bona fide* intention to construct the Station in Gallup at the time it filed its original application. As Pulitzer explained in its original comments in support of its Petition for Rule Making, it originally applied for Channel 3 in Gallup with the intention of using the Station as a satellite station of KOAT-TV, Albuquerque. Pulitzer Comments at 10. It only later determined to explore the possibility of reallotment and a change in community of license when, "contrary to its initial expectations, further analysis . . . led it to conclude that the Gallup market cannot economically support operation of a television station." *Id.* Moreover, further analysis revealed that the proposed reallotment would better serve the public interest by producing a preferable arrangement of allotments. *See generally id. at passim.* The alleged "evidence" KOB presents in support of its charge does not undermine this explanation and hardly establishes bad faith or abuse of process. Indeed, most of KOB's contentions in this regard merely rehash issues raised in connection with its first argument discussed above, and do not warrant further rebuttal here.

Second, KOB's claim must be rejected as procedurally barred. KOB states that the predicate for its allegation is "[t]he record in this proceeding" which, it avers, "establishes that Pulitzer never intended to construct Channel 3 at Gallup." Petition at 9. To the extent this is so, KOB possessed of all of the material facts supporting its argument that Pulitzer filed the Gallup application under false pretenses when it filed its comments and reply comments in this proceeding; however, it never raised this factual issue and, under the Commission's rules, may not do so now. *See* 47 C.F.R. § 1.106(c). KOB's charges of abuse of process and bad faith are entirely without factual foundation and are procedurally defective and, accordingly, must be dismissed.

III. CONCLUSION

For the foregoing reasons, KOB has entirely failed to establish an error of law or of fact warranting reconsideration of the Bureau's decision to reallocate Channel 3 from Gallup, NM, to Farmington, NM, and to modify the Station's construction permit to specify Farmington as the community of license. Accordingly, the Commission should reject KOB's arguments and deny its Petition for Reconsideration.

Respectfully submitted,

PULITZER BROADCASTING COMPANY

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CERTIFICATE OF SERVICE

I, Beverly J. Magnone, a secretary for the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, do hereby certify that a copy of the foregoing "Opposition to Petition for Reconsideration" was delivered by hand this 11th day of April, 1996 to:

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